

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALEXIS TELESFORD	:	CIVIL ACTION
	:	
vs.	:	
	:	
	:	NO. 03-6675
CHERYL J. STURM	:	

MEMORANDUM AND ORDER

JOYNER, J.

December 2, 2004

Defendant, Cheryl J. Sturm, Esquire, has filed a motion pursuant to Fed.R.Civ.P. 12(b)(6) for dismissal of all of the plaintiff's claims against her in this legal malpractice action. For the reasons which follow, the motion shall be granted.

Factual Background

On June 11, 1990, the plaintiff, Alexis Telesford, was convicted of distribution and conspiracy to distribute heroin and cocaine, and racketeering and interstate travel in aid of a racketeering enterprise following a jury trial in the United States District Court for the District of Delaware. He was thereafter sentenced to 327 months' imprisonment and his judgment of conviction and sentence were affirmed by the U.S. Court of Appeals for the Third Circuit on February 7, 1991. Sometime in 1996, Plaintiff contacted the defendant, a criminal defense attorney, about filing a motion on his behalf under 28 U.S.C. §2255 (seeking a writ of habeas corpus) to attack his conviction

and sentence.

Although it is unclear when Plaintiff actually retained the defendant, the complaint alleges that while Defendant was in the process of preparing the 2255 motion, Congress enacted a law that required criminal defendants to file their habeas corpus motions within one year of the date on which their convictions became final or within one year of the new law's effective date. Thus, Plaintiff avers, someone in his position whose conviction became final before the new law was effective, had until April 24, 1997 to file a Section 2255 motion. Although Plaintiff contends that he "vehemently urged defendant to be sure his motion was filed before this now known expiration date, Defendant nonetheless failed to promptly file the said motion causing the district court to deny it as untimely even though it was received by the court on April 24 or 25, 1997." (Complaint, ¶s 7-8) "Because of defendant's negligence in timely filing the motion as advised, Plaintiff forever lost his opportunity to challenge his conviction and sentence," and it is on this basis that he has brought this legal malpractice action against Defendant Sturm. (See Complaint, ¶ 9). Plaintiff seeks damages in the amount of \$76,000--comprised of the \$9,800 in attorney fees paid for Defendant's representation and \$66,200 for damages for loss of his right to ever attack his conviction. Defendant now moves to dismiss the complaint on numerous grounds, including lack of

jurisdiction, failure to state a claim upon which relief may be granted and as barred by the statute of limitations.

Standards Applicable to Rule 12(b)(6) Motions

It has long been the rule that in considering motions to dismiss pursuant to Fed.R.Civ.P. 12(b)(6), the district courts must "accept as true the factual allegations in the complaint and all reasonable inferences that can be drawn therefrom." Allah v. Seiverling, 229 F.3d 220, 223 (3d Cir. 2000)(internal quotations omitted). See Also: Ford v. Schering-Plough Corp., 145 F.3d 601, 604 (3d Cir. 1998). A motion to dismiss may only be granted where the allegations fail to state any claim upon which relief may be granted. See, Morse v. Lower Merion School District, 132 F.3d 902, 906 (3d Cir. 1997). The inquiry is not whether plaintiffs will ultimately prevail in a trial on the merits, but whether they should be afforded an opportunity to offer evidence in support of their claims. In re Rockefeller Center Properties, Inc., 311 F.3d 198, 215 (3d Cir. 2002). Dismissal is warranted only "if it is certain that no relief can be granted under any set of facts which could be proved." Klein v. General Nutrition Companies, Inc., 186 F.3d 338, 342 (3d Cir. 1999)(internal quotations omitted).

It should be noted that courts are not required to credit bald assertions or legal conclusions improperly alleged in the complaint and that legal conclusions draped in the guise of

factual allegations may not benefit from the presumption of truthfulness. In re Rockefeller, 311 F.3d at 216. A court may, however, look beyond the complaint to extrinsic documents when the plaintiff's claims are based on those documents. GSC Partners, CDO Fund v. Washington, 368 F.3d 228, 236 (3d Cir. 2004); In re Burlington Coat Factory Securities Litigation, 114 F.3d 1410, 1426. See Also, Angstadt v. Midd-West School District, 377 F.3d 338, 342 (3d Cir. 2004). Moreover, although normally an affirmative defense required to be asserted in an answer, Third Circuit law permits a statute of limitations defense to be raised by 12(b)(6) motion if the time alleged in the statement of a claim shows that the cause of action has not been brought within the statute of limitations. Robinson v. Johnson, 313 F.3d 128, 135 (3d Cir. 2002), citing Hanna v. U.S. Veterans Admin. Hospital, 514 F.2d 1092, 1094 (3d Cir. 1975). "If the bar is not apparent on the face of the complaint, then it may not afford the basis for a dismissal of the complaint under Rule 12(b)(6)." Id., quoting Bethel v. Jendoco Constr. Corp., 570 F.2d 1168, 1174 (3d Cir. 1978).

Discussion

Legal malpractice claims in Pennsylvania can sound in either trespass (negligence) or assumpsit (contract). Guy v. Liederbach, 501 Pa. 47, 55, 459 A.2d 744, 748 (1983). A legal malpractice claim under a trespass theory requires a plaintiff to

prove, *inter alia*, that an attorney failed to exercise the ordinary skill and knowledge expected of an attorney. Iqbonwa v. Cameron, Civ. A. No. 03-5407, 2004 U.S. Dist. LEXIS 2128 at *4-5 (Feb. 2, 2004), citing Sherman Indus., Inc. V. Goldhammer, 683 F.Supp. 502, 506 (E.D.Pa. 1988). To sustain a claim of legal malpractice in assumpsit, a "plaintiff must show that the lawyer failed to follow the client's specific instructions or otherwise breached a specific provision of the contract and may not rely upon evidence that the lawyer merely breached the general, non-contractually created duty of care." Id; Williams v. Sturm, 110 F.Supp.2d 353, 357-358 (E.D. Pa. 2000), quoting Svarzbein v. Sidel, 1999 U.S. Dist. LEXIS 14516, 1999 WL 729260 at *9 (E.D. Pa. Sept. 10, 1999).

Of course, it is the nature of the plaintiff's asserted injury which governs which statute of limitations applies in a particular malpractice case. Garcia v. Community Legal Services Corp., 362 Pa. Super. 484, 524 A.2d 980, 982 (1987). An action in assumpsit for breach of an oral contract is subject to the four-year statute of limitations under 42 Pa.C.S. §5525 whereas the two-year statute applies to actions in trespass for professional negligence. Iqbonwa, 2004 U.S. Dist. LEXIS at *4. See Also, 42 Pa.C.S. §5524. For a written contract, the limitation period is six years. Bailey v. Tucker, 533 Pa. 237, 254, n. 17, 621 A.2d 108, 116, n.17 (1993); 42 Pa.C.S. §5527.

Under the law of Pennsylvania, it is the duty of one asserting a cause of action against another to use all reasonable diligence to inform himself properly of the facts and circumstances upon which the right of recovery is based and to institute the suit within the prescribed statutory period. Trice v. Mozenter, 356 Pa. Super. 510, 516, 515 A.2d 10, 13 (1986). "Thus, the statute of limitations begins to run as soon as the right to institute and maintain a suit arises." Id., quoting Pocono International Raceway, Inc. v. Pocono Produce, Inc., 503 Pa. 80, 84, 468 A.2d 468, 471 (1983).

In this case, while he avers that "[t]his is a civil legal malpractice action brought against defendant pursuant to the theory of 'Assumpsit,'" Plaintiff also alleges that the defendant was negligent in failing to timely file the 2255 motion. Thus it appears that the plaintiff is asserting legal malpractice under both negligence and contract theories. The complaint further avers that Defendant filed the 2255 motion on April 24, 1997 but that it was denied by the U.S. District Court as having been untimely filed.¹ Although Plaintiff fails to allege when he

¹ Although the the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") did not specifically state as much, the Third Circuit has implied from the statute a one-year grace period for those petitioners whose convictions became final before the effective date of AEDPA. Under that one-year grace period, those prisoners had until April 23, 1997 to file habeas corpus petitions in the district courts. Nara v. Frank, 264 F.3d 310, 314-315 (3d Cir. 2001); Burns v. Morton, 134 F.3d 109, 111 (3d Cir. 1998).

learned that his motion for habeas relief had been rejected as untimely, he asserts that Ms. Sturm was still working for him as of July 10, 1998. Accordingly, giving Plaintiff the benefit of the doubt that the limitations period began running on that date, his complaint in this case was not filed until December 11, 2003 and thus clearly falls outside the two and four-year statutes of limitations applicable to negligence and oral contract actions. Hence, to the extent that Mr. Telesford is claiming legal malpractice under these theories, those claims are clearly time-barred.²

² We further find that the plaintiff's complaint fails to state a claim upon which relief may be granted against this defendant under a trespass theory. To bring a legal malpractice claim against a criminal defense attorney resulting from representation in criminal or habeas corpus proceedings, a plaintiff must plead and prove the following elements:

- (1) the employment of the attorney;
- (2) reckless or wanton disregard of the defendant's interest on the part of the attorney;
- (3) the attorney's culpable conduct was the proximate cause of an injury suffered by the defendant/plaintiff, *i.e.*, "but for" the attorney's conduct, the defendant/plaintiff would have obtained an acquittal or a complete dismissal of the charges;
- (4) as a result of the injury, the criminal defendant/plaintiff suffered damages.

Moreover, a plaintiff cannot prevail in an action in criminal malpractice unless and until he has pursued post-trial remedies and obtained relief which was dependent upon attorney error. Bailey v. Tucker, 533 Pa. at 250, 621 A.2d at 114-115; Hull v.

We further find that Mr. Telesford's claim that Ms. Sturm breached a written contract with him also cannot stand in this Court. Under the Pennsylvania Supreme Court's decision in Bailey v. Tucker, supra. (which we find has application in habeas corpus proceedings in accordance with the decisions in Williams v. Sturm, Hull v. Mallon, both supra., and Sample v. Dugan, Civ. A. No. 00-CV-2022, 2000 U.S. Dist. LEXIS 9971 (E.D. Pa. July 19, 2000)) the amount of recoverable damages brought under the assumpsit theory in criminal legal malpractice actions is limited to the amount actually paid for the legal services plus statutory interest. See, Bailey, 533 Pa. At 252. The amount of legal fees claimed here is \$9,800 and thus, even adding interest at the statutory rate of 6%, the complaint clearly fails to plead the minimum amount of damages required to maintain diversity jurisdiction. Accordingly, we shall dismiss the complaint in this matter in its entirety.

An order follows.

Mallon, Civ. A. No. 00-CV-5698, 2001 U.S. Dist. LEXIS 12758, at *5 (E.D. Pa. Aug. 21, 2001); Williams v. Sturm, 110 F.Supp.2d at 358-359. As Mr. Telesford's complaint fails to allege either that he would have obtained an acquittal or a complete dismissal of the charges against him or that he has succeeded in obtaining post-trial relief that was dependent upon attorney error, we conclude that the complaint fails to state a claim upon which relief may be granted.

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AND NOW, this 2nd day of December, 2004, upon consideration of Defendant's Motion and Revised Motion to Dismiss the Plaintiff's Complaint and Plaintiff's Cross-Motion in Opposition to Defendant's Motion to Dismiss Complaint, it is hereby ORDERED that Defendant's Motions are GRANTED, Plaintiff's Cross-Motion in Opposition is DENIED and the Plaintiff's Complaint in this matter is DISMISSED for the reasons set forth in the preceding Memorandum Opinion.

BY THE COURT:

s/J. Curtis Joyner
J. CURTIS JOYNER, J.